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JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted].18

THE TERRITORY OF NEW MEXICO *EX REL.* E. J. McLEAN AND COMPANY, APPELLANT,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

SUPPLEMENTAL BRIEF IN REPLY TO APPELLEE'S BRIEF ON THE QUESTION OF THE JURISDICTION OF THE COURT.

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THE DENVER AND RIO GRANDE RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

Supplemental Brief in Reply to Appellee's Brief on the Question of the Jurisdiction of the Court.

I.

It is contended by appellant that section 2 of the act of Congress of March 3, 1885 (23 Stats. at Large, 443), confers jurisdiction upon this court to entertain this appeal. The first section of this act provides that no appeal or writ of error shall be allowed, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. The second section provides that section 1 shall not apply to any case wherein is involved the validity of a treaty or statute of or an authority exercised under the United States, but that in

all such cases an appeal or writ of error may be brought without regard to the *sum or value in dispute.*

The appellant submits that the claim of the power of the Legislative Assembly of the Territory to enact the statute requiring the relator to pay the sum of ten cents on each of the hides tendered to the defendant for shipment draws in question the exercise of an authority under the United States. As the grant of authority to legislate, together with its limitations, comes solely from an act of Congress, it would seem that the statement of the proposition would be sufficient in itself.

We will not attempt to notice all the authorities cited in appellee's brief. We submit that the decisions based upon other statutes than the one under consideration, and upon criminal cases under this statute, are not pertinent.

II.

Is this an authority exercised under the United States? We submit that validity of the act of the Legislative Assembly of the Territory of Utah, making the office of Auditor of Public Accounts elective by the joint vote of the two houses of the Legislative Assembly, was called in question in *Clayton vs. Utah,* and the court took jurisdiction of the case.

Clayton vs. Utah, 132 U. S., 632.

In *Clough vs. Curtis,* 134 U. S., which was a mandamus proceeding, the validity of the acts of a territorial legislature were passed upon, although no money judgment whatever, exclusive of costs, could have been in the record.

We also cite *United States vs. Lynch,* 137 U. S., 286; also *Maricopa and Phœnix Railroad vs. Arizona,* 156 U. S., 350.

In the last case it is true that the effect of an act of Congress granting rights of way over an Indian reservation was considered. The power of the Territory to tax the right of way under territorial legislation was also necessarily passed

upon. The railroad company was insisting that the establishment of an Indian reservation exempted it from taxation. The court passed upon the effect of the act of Congress granting the right of way, and held that it had the effect of re-establishing "the full sway and dominion of the territorial authority." In this case we contend that Congress alone has the power to legislate upon, and exercise the power attempted to be exercised by, the Territory, through its Cattle Sanitary Board.

Linford vs. Ellison, 155 U. S., 503, is much relied upon by appellee. No territorial statute was in question. It involved the validity of a village ordinance taxing farming lands so far distant from the settled portion of the village as to make the expenditure of the taxes raised by the village of no benefit to the land so taxed. The decision of the district, as well as the supreme court of the Territory, was against the validity of the ordinance. The courts of Utah held that under the territorial statute no such power of taxation was granted.

This court in the opinion in that case quotes from *Lynch vs. United States,* 137 U. S., as follows:

> "The validity of a statute, or the validity of an "authority is drawn in question, when the existence "or constitutionality, or legality of such statute, or "authority is denied, and the denial forms the sub-"ject of direct inquiry."

We submit this case to that test. The writ commands the defendant to perform its duty as a common carrier; it gives as an excuse the statute prohibiting it from accepting the hides tendered it, and transporting them. The appellant contends that the excuse furnishes no defense, because the statute is void, and the legislature had no authority to enact it.

III.

Is any money value necessary to give jurisdiction? If so, is any *sum or value in dispute?* In the case of *Clayton vs. Utah, supra,* an office was in dispute. If an office purely honorary, which carried with it no salary, fees, or emoluments, was in dispute, would the court say it had no *value* to the claimant and decline jurisdiction?

In *Clough vs. Curtis, supra,* there could have been "no sum or value in dispute." It involved the performance of a naked duty—no more.

Is any "sum or value" in dispute in this case? We submit there is. In *Territory vs. Albright* the court at the present term declined jurisdiction of a *quo warranto* case, because the term of office having expired there could be no value to the office.

We submit the performance of a duty is presumed to be of some value in money to the person who demands its performance. Specific property, real or personal, when its recovery is sought, may as a matter of fact be valueless to the claimant. It may subject the claimant to loss and not gain, but the law presumes it to be of value and for the unlawful withholding of it accords him at least nominal damages. Would this court decline jurisdiction in an equity case for an injunction when no relief was prayed for a money recovery? If the construction contended for by appellee is to be adopted, this would seem to follow. Not only that, but no redress by appeal to this court can be had from the decisions of territorial courts sustaining any unconstitutional legislation, whatever may be its effect, unless, in the suit brought to test it, the recovery of some sum of money is sought.

Respectfully submitted.

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